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MAR 30 1992

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Tariff Filing Requirements) CC Docket No. 92-13
For Interstate Common)
Carriers)

COMMENTS OF SOUTHWESTERN BELL CORPORATION

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SUMMARY

The Commission has general and specific statutory authority to forebear and/or to streamline its tariff regulation of providers of communications services. Such authority is found in Section 4(i) and 203(b)(2) of the Communications Act, and it includes the authority to grant relief from Act's the tariff filing requirements.

The Commission has additional authority and discretion under Section 303, Title III, of the Communications Act to grant regulatory forbearance, including relief from tariff filing requirements, to radio common carriers and radio service providers. Such relief is consistent with the competitive and local nature of the cellular and paging service markets, and is fully within the realm of the Commission's specific public interest authority to provide for a larger and more effective use of radio communications.

The Commission's authority to grant regulatory forbearance and to waive tariff filing requirements is, however, limited by the constitutional requirements of due process and the equal protection of laws. The Commission cannot lawfully discriminate among providers of the same communications service by requiring one group of providers to file tariffs and exempting other providers of the service from the tariff filing requirements.

The *Maislin* case did not interpret the Communications Act, and thus is not controlling on this issue. In any event, Section 203(b)(2) of the Communications Act gives the Commission specific authority to modify the Act's Section 203 tariff filing requirements.

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Southwestern Bell Corporation ("SBC"), on behalf of its operating subsidiaries, submits these comments in response to the Commission's January 28, 1992 *Notice of Proposed Rulemaking* ("NPRM") on tariff filing requirements for interstate common carriers. The *NPRM* seeks comment on the lawfulness of the Commission's regulatory forbearance policies as they relate to the tariffing requirements of the Communications Act.

SBC believes that the Commission has the authority to adopt regulatory forbearance policies and to streamline regulation for common carriers and service providers under the Communications Act, provided that such policies are equally applied to all providers of the same communications services. The authority includes permission and discretion to forebear and/or to streamline the Communications Act's tariff filing requirements.

I. The Commission Has General Forbearance And/Or Streamlining Authority Under Sections 4(i) And 203 Of The Communications Act.

The Commission has authority under Section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter [Title I], as may be necessary in the execution of its functions." One of those functions is to make available, so far as possible, to all the people of the United States a "rapid, efficient, nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" 47 U.S.C. §§ 154(i), 151.

The Commission also has Title II authority under Section 203 - the tariffing provision of the Act - in its discretion and for good cause shown to "modify any requirement made by or under the authority of this Section either in particular instances or by general order applicable to special circumstances or conditions" [Emphasis added]. 47 U.S.C. § 203(b)(2).

Each of these provisions gives the Commission general and/or specific authority to engage in forbearance or streamlined regulation and to modify various requirements including the tariff filing provision of Section 203.

II. The Commission Has Additional Forbearance And/Or Streamlining Authority Relating To Radio Communications Under Title III, Section 303, Of The Communications Act.

Besides the authority granted to the Commission under Titles I and II, the Communications Act contains special provisions relating to radio communications under Title III. Included in those provisions is the authority under Section 303 to "generally encourage the larger and more effective use of radio in the public interest," and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter" as the public convenience, interest, or necessity require. 47 U.S.C. §§ 303(g), 303(r).

As such, Section 303 gives the Commission discretion and specific authority to make special provisions relating to radio communications under a broad public convenience, interest, or necessity standard.¹ The authority so granted is in addition to the grants under Titles I and II, and it too gives the Commission proper authority to exempt providers of radio communications services from the tariff filing requirements when such action is in the public interest.

¹See *National Association of Regulatory Commissioners v. Federal Communications Commission*, 525 F.2d 630, 635 (D.C. Cir. 1976).

III. The Commission's Statutory Forbearance And/Or Streamlining Authority Is Necessarily And Constitutionally Limited By The Guarantees Of Due Process And Equal Protection Under The Law.

As part of due process, there is a constitutional guarantee to equal protection under the law.² Equal protection is denied when persons engaged in the same business are subjected to different restrictions or are held to different privileges.³ It is also denied when the law is not equally enforced or is unevenly applied.⁴

While, as noted previously, the Commission has authority to forebear and/or to streamline tariff regulation, it can only do so, if such actions are fairly and evenly applied to persons and carriers engaged in similar circumstances. The U.S. Supreme Court in *Yick Wo v. Hopkins*, *supra*, made this clear:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is . . . within the prohibition of the

²*Mathews v. De Castro*, 429 U.S. 181, 97 S. Ct. 431, 432 n.1, 50 L.Ed.2d 389 (1976); U.S. Const. Amend. V.

³*Soon Hing v. Crowley*, 113 U.S. 703, 709, 5 S. Ct. 730, 733 (1885).

⁴*Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 1073 (1886); for administrative application, see, e.g., *Garnett v. Federal Communications Commission*, 513 F.2d 1056, 1060 (D.C. Cir. 1975).

constitution. 118 U.S. at 373-374, 6 S.
Ct. at 1073.

Thus, to the extent that the Commission decides to adopt regulatory forbearance and/or streamlined regulation for a particular person or carrier or for the services provided by that person or carrier, it may do so, subject to the limitation that the same forbearance or streamlined regulation be applied equally to all providers of the service. Ergo, if the Commission decides to relax or eliminates tariff filing requirements for a particular group of service providers, its rule or order in that regard must apply equally to all providers of those services. Fairness and equal protection demand no less.⁵

IV. The Commission Has Properly Decided Not To Require Providers Of Radio Communications Services To File Tariffs.

In CC Docket No. 85-89, the Commission decided not to require rate and tariff regulation of Public Land Mobile Service licensees. The Commission determined that, given the competitive nature of the radio services market, tariff regulation of such services was "not necessary to assure

⁵True competition will not result if the Commission applies asymmetrical and disparate regulation to certain carriers. True competition will only result when the Commission modifies its rules giving all providers an equal opportunity to compete. For a more detailed discussion on the rule changes that are necessary, see the *Comments* and *Reply Comments* of Southwestern Bell Telephone Company in CC Docket No. 91-141 and specifically Appendix E to the *Reply Comments*.

that [such] communications services are readily available and reasonably priced."⁶

The Commission was correct in this determination. A tariff filing requirement in the radio services market has historically proven to be unnecessary. Cellular and paging carriers in that market have engaged in vigorous competition, and the public has been better served through such competition than it would have been had the Commission insisted that such carriers compete only on the basis of filed tariffs.⁷ Obviously, good cause plainly exists for a policy of regulatory forbearance concerning the competitive operations of these carriers, and the Commission has furthered the public interest by not imposing tariffing requirements on such carriers.

The Commission has clear statutory authority to waive the tariff filing requirements for providers of radio communications services. As noted earlier, that authority

⁶*In the Matter of Preemption of State Entry Regulation In The Public Land Mobile Service*, 59 Rad. Reg. 2d (P&F) 1518 (1986), paras. 1 & 33; vacated on state preemption issue, National Association of Regulatory Utility Commissioners v. Federal Communications Commission, No. 86-1205, 1987 U.S. App. LEXIS 17810 (D.C. Cir. 1987); Memorandum Opinion And Order, CC Docket No. 85-89 (released October 21, 1987).

⁷The absence of rate and tariff regulation has allowed cellular carriers to engage in competitive bidding, there has been no price collusion among such carriers, and the clear beneficiaries of this flexibility have been consumers. Conversely, if the Commission were to require such carriers to file tariffs, it would be merely burdening its already scarce administrative resources.

exists under the Commission's broad public convenience, interest, or necessity discretion under Section 303 of Title III relating to radio communications. The Commission has exercised that discretion by only requiring providers of radio communications to obtain radio licenses before offering their services and by not requiring them to file tariffs. In addition, while Title III contains a number of detailed provisions concerning the Commission's authority over radio communications, it contains no specific tariffing requirement or provision. Another difference between Title II and Title III regulation is that Title III has its own licensing requirements, whereas the Commission handles such matters for other carriers under Title II, Section 214.

Similar authority to waive the filing of tariffs by such carriers or service providers is found in Section 203(b)(2). That Section gives the Commission specific authority to modify any requirement of Section 203 (including tariffing) by general order applicable to special circumstances or conditions. The special circumstances and separate classification of radio communications providers have not only been recognized by the Commission, they have also been expressly recognized by statute - namely, Title III - which gives the Commission discretion in regard to the regulation and provision of such services. Indeed, the statute directs the Commission to encourage the "larger and more effective use of radio in the public interest," and the

Commission has done so by eliminating unnecessary regulatory burdens, including the tariff filing requirements, for such services.

Finally, federal forbearance regulation is justified in this instance because mobile radio and paging services are primarily local in nature and, if they should be regulated at all, such regulation would more properly lie with the individual state jurisdictions. The Commission has long recognized this fact and for that reason has seen little or no need to apply federal tariff regulation to these services.⁸

V. The Maislin Decision Does Not Mandate The Tariffing Of All Common Carrier Communications Services.

The implication of AT&T's complaint is that the *Maislin* decision requires without limitation the tariffing of all common carrier communications services. SBC disagrees with this contention.⁹

⁸*MTS/WATS Market Structure*, 97 F.C.C. 2d 834, 882 (1984); *Mobile Radio Services*, Gen. Dkt. No. 80-183, 93 F.C.C. 2d 908, 920 (1983); *Cellular Communications Systems*, 86 F.C.C. 2d 469, at 483-484, 504 (1981). Several states have followed suit and have deregulated these services. Moreover, Section 203 only applies to interstate services, and the Commission does not have jurisdiction with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate radio communications services. 47 U.S.C. § 2(b)(1).

⁹*Maislin Industries v. Primary Steel, Inc.*, 110 S. Ct. 2759, 111 L.Ed.2d 94 (1990). Even in *Maislin*, there was recognition of the authority to exempt an entire class of carriers (i.e., motor contract carriers) from the general tariff requirements. See n.13 and 49 U.S.C. § 10762(f). Here, that authority is broader and Section 203(2)(b)

The *Maislin* decision interpreted the Interstate Commerce Act, and did not interpret the Communications Act. As such, it does not control the Commission's decision in this case. In addition, the statutory provisions at issue are different. The Interstate Commerce Act does not contain a provision like Section 203(b)(2) which allows the Commission to modify any requirement under Section 203. Thus, the Commission's authority on this issue is broader under the Communications Act than is the authority of the Interstate Commerce Commission under the Interstate Commerce Act, and the FCC has express statutory authority under Section 203(b)(2) to modify the tariff filing and other requirements of that Section. Accordingly, *Maislin* does not support the position that the Commission lacks the statutory authority under the Communications Act to grant forbearance or to waive the tariff filing requirements of Section 203.

This is not to say, however, that the FCC can lawfully discriminate among providers of a service by requiring one group of providers to file tariffs while exempting from the tariff filing requirement another group of carriers or providers of the same service, and AT&T's

specifically allows such an exemption to be granted by general order such as the one employed in relieving providers of Public Land Mobile Services from the tariffing requirements.

argument has merit on that point.¹⁰ Such disparate treatment, besides being anticompetitive, flies in the face of the guarantees of equal protection and due process of law and for reasons previously stated is unconstitutional.

Thus, if the Commission decides to require providers of a service to file tariffs or, alternatively, to exempt providers from that requirement, it must be consistent in its treatment of all providers of that service - either all must file or none must file tariffs. Otherwise, the Commission will have engaged in unjust and unreasonable discrimination in violation of the Constitution and will have granted an unlawful, and unsupported anti-competitive preference to one group of service providers.¹¹

VI. Conclusion.

SBC believes that the Commission has authority to engage in forbearance regulation including the authority to exempt providers of a communications service from the Section 203 tariff filing requirements. SBC further believes that the Commission acted properly and within its statutory authority and discretion in not applying tariff

¹⁰The same argument is also applicable to local exchange carriers ("LECs") and alternate local carriers ("ALCs") providing local exchange services in the same market. The argument is not limited in its application to interexchange carriers.

¹¹Of course, this is not a problem in terms of the radio service exemption, since as stated earlier that exemption has been practically applied to all providers of radio communications services.

filing requirements to providers of radio communications services under Title III.

SBC does not interpret the *Maislin* decision as changing the Commission's authority under the Communications Act or as imposing a mandatory requirement that all carriers or providers of a communication service file tariffs. However, to comply with due process and equal protection guarantees, any tariff filing requirement or exemption must be applied equally to all providers of the same service.

Respectfully submitted,
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